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IN THE

Supreme Court of the United States

October Term, 1970.

No. [redacted]
291

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

Petitioner, Donald R. McVean, respectfully prays that a writ of certiorari issue to review two judgments of the District Court of Appeal of Florida, Second District. The first judgment and sentence was entered on October 24, 1969, rehearing denied November 20, 1969, affirming the judgment and sentence entered on December 11, 1968 by the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas County, which sentenced him to imprisonment for a term of from six months to five years for the crime of possession of marijuana. The second judgment was entered on December 31, 1969, per curiam, rehearing denied February 5, 1970, affirming the judgment and sentence entered on May 23, 1969 by the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas

County, which sentenced him to imprisonment for a term of from six months to five years for the crime of selling marijuana, said sentence to run consecutively to the prior sentence imposed.

A petition for writ of certiorari in the first case of possesssion was dismissed by the Supreme Court of Florida on January 30, 1970, for alleged procedural error, rehearing denied February 24, 1970. A petition for writ of certiorari in the second case of selling was dismissed by the Supreme Court of Florida for lack of jurisdiction on April 8, 1970. The petition in this second case was unaccompanied by the entire record, the same procedural error which occasioned the dismissal of the petition in the first case.

OPINIONS BELOW.

The opinion of the District Court of Appeal of Florida, Second District, in the first case of "possession" is reported at 227 So. 2d 535, and is set out in the Appendix, *infra*, p. 1, together with a copy of the order denying rehearing entered on the 20th day of November, 1969, Appendix, *infra*, p. 13. The order of the Supreme Court of Florida granting a motion to dismiss, Appendix, *infra*, p. 17, and the order denying the petition for rehearing dated the 24th day of February, 1970 are set out in the Appendix, *infra*, p. 19.

The per curiam opinion of the District Court of Appeal of Florida, Second District, in the second case of "selling" is reported at 230 So. 2d 507(2), and is set out in the Appendix, *infra*, p. 20, together with a copy of the order denying rehearing entered on the 5th day of February, 1970, Appendix, *infra*, p. 21. The order of the Supreme Court of Florida denying the Petition for Writ of Certiorari for lack of jurisdiction is set out in the Appendix, *infra*, p. 22.

JURISDICTION.

The earlier of the two judgments of the District Court of Appeal of Florida, Second District, was rendered and entered on October 24, 1969. Rehearing was denied on November 20, 1969. The petition for certiorari to the Supreme Court of Florida was dismissed January 30, 1970. Rehearing was denied February 24, 1970. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED.

1. Whether the exclusion by law from Florida juries of persons between the ages of seventeen and twenty-one years of age violates the Fourteenth Amendment to the United States Constitution as to a defendant in this age group who is not protected by special juvenile court laws.

2. Whether a criminal conviction in a Florida court and its affirmance on appeal violates the due process clause of the Fourteenth Amendment where the defense of entrapment has been raised and the prosecution fails to offer any proof thereafter that the intent to commit the crime arose in the mind of the accused rather than in the mind of the police officer.

STATEMENT OF THE CASE.

Petitioner, Donald R. McVean, is hereinafter usually referred to as the defendant. On May 17, 1968 at about 6:30 P. M., Joe Wood, a close friend of the defendant for over a month, came to the defendant's mother's home where the defendant resided and was admitted by the defendant as he had been on numerous prior occasions. Shortly after he was admitted, two deputy sheriffs forced their way into the home with a search warrant and arrested the defendant and incarcerated him in the county jail. Later it was learned that his friend, Joe Wood, was actually Joseph Canali, a 24 year old police officer of the City of St. Petersburg.

Donald R. McVean was charged with possession of marijuana on April 14, 1968; two charges of selling hashish on April 19, 1968; possession of hashish on April 20, 1968; selling a hallucinogenic drug on May 13, 1968; possession of a hallucinogenic drug on May 17, 1968; possession of marijuana on May 17, 1968; selling a hallucinogenic drug on May 17, 1968, and the other case here sought to be reviewed, possession of marijuana on May 15, 1968. All nine of these direct informations were filed just prior to the arrest of May 17, 1968. All cases have been tried or were nol prossed except the two cases here sought to be reviewed and those cases dealing with the hallucinogenic drugs which were nol prossed and refiled in the Federal Court and are presently pending. (*United States of America v. Donald R. McVean*, No. 69-176-Cr.T in the United States District Court for the Middle District of Florida, Tampa Division).

Prior to the trial of the cases here for review and after the panel of prospective jurors had been qualified a "CHALLENGE TO THE PANEL" was duly filed with the trial judge insisting that under the Fourteenth Amendment to the Constitution of the United States every citizen was entitled to

to trial by a jury from which citizens of the defendant's class had not been excluded by the laws of that State. The Challenge to Panel is set out in the Appendix, *infra*, p. 23. The Challenge was denied in both cases.

At the conclusion of the state's case in both cases here sought to be reviewed the defendant requested a directed verdict on the grounds that the defense of entrapment had been raised by the defendant and that it then became incumbent upon the state to prove that the intent to commit a crime arose in the mind of the defendant and not in the mind of the police officer.

Not only did the state fail to produce any evidence to refute the entrapment defense and thereby overcome the presumption of innocence of the defendant* but the trial judge refused to give the written requested charge on entrapment to the jury. (T p. 10) Appendix, *infra*, p. 25.

* "T" refers to the Original Transcript.

REASONS FOR GRANTING THE WRIT.

I.

THE EXCLUSION BY LAW FROM JURIES OF PERSONS IN A CERTAIN AGE CATEGORY, NOT OTHERWISE PROTECTED BY SPECIAL JUVENILE COURTS, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

> "No free man shall be arrested or detained in prison, or deprived of his freehold, or outlawed or banished, or in any way molested; and we will not set forth against him, *unless by the lawful judgment of his peers and by the law of the land.*" (Emphasis supplied.)

Thus, the MAGNA CARTA, generally regarded as the chief bulwark and defense of men of English speech everywhere since the year 1215, demanded of government a "jury of his peers" for any accused.[1]

"Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." Thus this court has heretofore acknowledged that minors are entitled to *some* adults' due process in the case of *In Re Gault* (1967) 387 U. S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 and *Re Winship*, — U. S. —, 25 L. Ed. 2d 368, 90 S. Ct. —.

The Florida Constitution, Article V, Section 12, establishes special Juvenile Courts in Florida wherein the ages of the youthful offenders subject to its jurisdiction are to be set by the legislature of that state. The legislature has enacted Florida Statutes Chapter 39.01 specifying that all juveniles to age seventeen (17) are subject to the jurisdiction of the juvenile court established by the State Constitution. Section 39.02(5) of said Statute provides that if the

1. Comptoms Picture Encyclopedia Vol. 9, 1953 Edition, "MAGNA CARTA".

juvenile court obtains jurisdiction of a child under seventeen years of age ". . . the court shall retain jurisdiction, unless relinquished by order, until the child reaches twenty-one years of age. . . ." Thus a juvenile who is accused of violating the law of the state of Florida prior to his seventeenth birthday has the protection of the Juvenile Court until his twenty-first birthday. On the other hand if a juvenile's first brush with the law occurs after his seventeenth birthday he is treated as an adult without the protection of the Juvenile Court. At the same time a juvenile so situated is denied the right enjoyed by adults to be tried by a jury of his peers, that is; drawn from a jury list from which persons of his own age group, ages 17 through 20, have not, by law, been excluded.

Article XIV of the Amendments to the Constitution of the United States provides in Section One (1) thereof that

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chapter 40 of the Statutes of the State of Florida provide the minimum age for jurors as twenty-one years. The Federal Courts have repeatedly held that

> ". . . an intentional, planned, and deliberate exclusion of or discrimination against members of a particular political or economic group, religious faith, race, ancestry, or sex, by officers in charge of the selection and summoning of jurors, is in contravention of

the right to jury trial and of the 'due process' and 'equal protection' clauses of the Fourteenth Amendment, at least as against an accused on trial or a litigant belonging to the class or race discriminated against. . . ."[2]

Juveniles up through age seventeen have a special court, adults have courts, but those persons between seventeen and twenty-one years are, by the laws of the State of Florida, deprived of jurors their own age. This deprivation should not be permitted to stand against the Fourteenth Amendment.

II.

The Refusal of a Trial Judge to Give a Requested Jury Instruction on Entrapment, Where This Defense Is Raised by an Accused, and the Refusal to Place the Burden on the State to Prove That Entrapment Did Not Occur Is a Clear Violation of the Presumption of Innocence Guarantee of the Fifth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and This Fundamental Law Should Be Made Fully Applicable to the States by This Court.

As late as May of 1963 this Court expressed the view that

". . . The defense of entrapment, its meaning, purpose and application, are problems that have sharply divided this Court on past occasions . . . whether in the absence of a conclusive showing the defense is for the court or the jury, and whether the controlling standard looks only to the conduct of the government, or also takes into account the predisposi-

2. 31 Am Jur—"Jury" Section 93 and cases therein cited.

tion of the defendant, are among the issues that have been mooted."

Lopez v. United States, 373 U. S. 427, 10 L. Ed. 462, 83 S. Ct. 1381, reh. den. 375 U. S. 870, 11 L. Ed. 2d 99, 84 S. Ct. 26 (decided on other grounds).

Thus it is that this Court has acknowledged the conflict existing between federal courts and state courts as respects the applicable law of entrapment and the Constitution.

The first pronouncement of this Court as to the applicability of the defense of entrapment to a plea of not guilty occurred in the 1932 case of *Sorrells v. United States*, 287 U. S. 435, 77 L. Ed. 413, 53 S. Ct. 210, 86 ALR 249 in which the majority opinion held the defense to be a matter for the jury in cases of violation of federal acts.

This Court in *Sherman v. United States*, 356 U. S. 369, 2 L. Ed. 848, 78 S. Ct. 819, while not directly deciding the point, stated that

> ". . . where the issue (entrapment) has been presented to them, the Courts of Appeal, since *Sorrells*, have unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused. . . ."

See also *Henderson v. United States*, 237 F. 2d 169, 61 ALR 2d 666 (CA 5, Fla.).

Thus some of the federal courts have recognized the guarantees of presumption of innocence, due process and equal protection to those charged with violations of federal laws without providing the same guarantees to those accused of violations of state laws. Others have refused to protect these constitutional guarantees. See Annotation in

61 ALR 2d 677. In *Martinez v. United States*, 373 F. 2d 810 (CA 10, NM) the tenth circuit court stated the following:

> "The defense of entrapment was unknown to the common law. Although it is now firmly entrenched in federal jurisprudence it is still not recognized in some state jurisdictions. . . . . *The fact that an accused asserts the affirmative defense of entrapment does not shift the burden of proof to him.* When the defense is raised or asserted, the burden is upon the government to prove beyond a reasonable doubt that entrapment did not occur. . . . If the evidence in the case on the issue is conflicting, the issue of entrapment should be submitted to the jury. . . . ". (Emphasis supplied.)

Florida recognized the defense of entrapment both in the federal court, *Henderson v. United States*, *supra*, and in the case of *Dupuy v. State*, 141 So. 2d 825 (3 DCA, Fla., 1962) wherein the law is stated as follows:

> "Where the defense of entrapment is raised the state must make a showing amounting to more than mere surmise and speculation that the intent to commit the crime originated in the mind of the accused and not in the minds of the officers."

The defense of entrapment in federal courts is, according to *Sorrells v. United States*, *supra*, firmly guaranteed to an accused who asserts it. The defense is supposed to be guaranteed to an accused in those states that recognize the defense. The defense should be made fully applicable to all persons accused of violation of the laws of the federal government or the state governments.

The facts of the instant case and the applicable law, conclusively show that the defendant, if not every citizen of the United States, is entitled to a jury instruction on entrapment where the defense has been raised.

CONCLUSION.

In view of the considerations set forth above, we respectfully submit that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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447 Third Avenue North,
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GARDNER W. BECKETT, JR.,
52 Sixth Street South,
St. Petersburg, Florida 33701,
Attorneys for Petitioner.

May, 1970

APPENDIX.

Opinion of the District Court of Appeal of Florida, Second District.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JULY TERM, A. D. 1969
CASE NO. 68-625

DONALD R. McVEAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed October 24, 1969.

Appeal from the Circuit Court for Pinellas County; B. J. Driver, Judge.

Lemuel S. Hunnicutt, St. Petersburg, for Appellant.

Earl Faircloth, Attorney General, Tallahassee, and Michael N. Kavouklis, Assistant Attorney General, Lakeland, for Appellee.

LILES, *Acting Chief Judge.*

Appellant, defendant below, was informed against and charged with violation of the narcotics law in that he was

alleged to have unlawfully possessed or to have had in his control a certain narcotic drug, to-wit: Cannabis Sativa, commonly known as marijuana. He was tried by jury, convicted, adjudicated guilty by the trial judge and sentenced to a term of six months to five years in the state prison.

From the record it appears that the State relied upon a witness named Joseph Canali who was an undercover officer employed by the City of St. Petersburg. He testified that his job was to ferret out and arrest the users and sellers of narcotics. He was dressed to resemble what is commonly known as a "hippie." In the course of his work he became acquainted with the defendant and several other youths of defendant's age. He came to know the defendant at the defendant's home and had been out with him and other youths on several occasions. On this specific occasion, to-wit: May 4, 1968, Officer Canali along with defendant, Donald McVean, together with two other youths went to a restaurant and then to a place called the Electric Zoo, which is a dance club for teenagers.

Upon arriving at the Electric Zoo, Canali and the other two youths went into the club and McVean left without saying where he was going but returned within ten or fifteen minutes and said to Canali, "Let's get out of here." At the suggestion of another of the youths, the group went to his parents' house. Once in the kitchen one of the youths put a small water pipe on the table and lined the bowl with tin foil. At this juncture, Officer Canali took from the box belonging to McVean a piece of the substance and placed it in a cigarette wrapper.

Officer Canali further testified that the group went into the living room and sat down in a circle. McVean then loaded the pipe with the substance from the box. After lighting it he passed it to one of the other youths who took a couple of drags and passed it on to another. It was passed from one person to the other with each one smoking

it until approximately 2:30 a.m. when all of the youths but Canali went to sleep. Canali then removed the tin foil from the pipe and placed the tin foil along with the ashes in a cigarette wrapper and placed them in his pocket. About 3:30 or 4:00 a.m. he woke everybody up and took defendant and two of the youths home.

The sample of the marijuana together with the tin foil and ashes were subsequently sent to Mr. Ward Hutson, an expert, who testified that the substance removed from the box by Canali was marijuana and that the resin contained in the tin foil was the result of marijuana smoking. Upon this evidence the jury found the defendant guilty.

Appellant has assigned nine points of error committed by the trial court. We have examined all of the points, studied the record and briefs submitted by both parties, and find it necessary only to discuss the question of entrapment.

Appellant argues that he requested an instruction on entrapment and the trial judge indicated he would give such a charge. However, the trial judge failed to give a charge on entrapment. The record reveals that at the conclusion of the judge's charge to the jury, the judge asked counsel for the defendant whether he had any argument to make and counsel responded that he did not. In any event, the record reveals that counsel made no objection whatsoever to the judge's failure to give an instruction on entrapment at the trial level and that his objection entered for the first time on appeal is untimely.

We do not believe the trial judge erred in his refusal to give an instruction on entrapment. A close and thorough study of the record reveals that Officer Canali did not ask the defendant on May 4 to purchase the marijuana. That he, in fact, did not know McVean had gone to purchase marijuana until he later advised Canali that he had purchased some "grass."

While it is true that Officer Canali was dressed as a "hippie" and became friends with McVean for the purpose of determining whether he, McVean, or any other youths possessed or were using marijuana, this in our opinion does not constitute entrapment as that defense requires that the intent to commit the crime be placed in the mind of the defendant by the officers. See *Pearson v. State*, Fla. App. 1969, 221 So. 2d 760.

As pointed out above, the other eight points urged by defendant are without merit. Appellant having failed to show error, the judgment is therefore affirmed.

PIERCE and MANN, *JJ.*, Concur.

Order Denying Rehearing.

IN THE

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT.

JULY TERM, A. D. 1969.

THURSDAY, NOVEMBER 20, 1969.

CASE NO. 68-625.

DONALD R. McVEAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Counsel for Appellant having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said Petition be and the same is hereby denied.

Order of Supreme Court of State of Florida Granting Motion to Dismiss.

IN THE

SUPREME COURT OF FLORIDA.

JANUARY TERM, A. D. 1970.

FRIDAY, JANUARY 30, 1970.

CASE NO. 39,227.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Respondent's motion to dismiss is granted and it is ordered that the petition for writ of certiorari be and the same is hereby dismissed.

Order Denying Rehearing.

IN THE

SUPREME COURT OF FLORIDA.

JANUARY TERM, A. D. 1970.

TUESDAY, FEBRUARY 24, A. D. 1970.

CASE NO. 39,227.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On consideration of the Petition for Rehearing, filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

Per Curiam Opinion of District Court of Appeal of Florida, Second District.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA.
SECOND DISTRICT.

JULY TERM, A. D. 1969.

CASE NO. 69-297.

DONALD R. McVEAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed December 31, 1969.

Appeal from the Circuit Court for Pinellas County; B. J. Driver, Judge.

Lemuel S. Hunnieutt, St. Petersburg, for Appellant.

Earl Faircloth, Attorney General, Tallahassee, and Michael N. Kavouklis, Assistant Attorney General, Lakeland, for Appellee.

PER CURIAM.

Affirmed.

HOBSON, *C. J.*, and LILES and MCNULTY, *JJ.*, CONCUR.

Order Denying Rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT.

JANUARY TERM, A. D. 1970.
THURSDAY, FEBRUARY 5, 1970.

CASE NO. 69-297.

DONALD R. McVEAN,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

Counsel for Appellant having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said Petition be and the same is hereby denied.

Order of Supreme Court of Florida Dismissing Petition for Writ of Certiorari.

IN THE SUPREME COURT OF FLORIDA.

JANUARY TERM, A. D. 1970.

WEDNESDAY, APRIL 8, 1970.

CASE NO. 39,432.

DISTRICT COURT OF APPEAL, SECOND DISTRICT.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

Challenge to Panel.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY.

CIRCUIT CRIMINAL NO: ———.

STATE OF FLORIDA,

Plaintiff,

v.

DONALD R. McVEAN,

Defendant.

Comes now the defendant in the above styled cause, by and through his undersigned attorney, and challenges the panel of prospective jurors in the above styled cause, prior to examination of any individual juror, on the grounds that the prospective jurors were not selected or drawn according to law in the following particulars:

I

The defendant in this cause is eighteen years of age.

II

The Fourteenth Amendment to the Constitution of the United States guarantees to every citizen of the United States the right to trial by a jury from which no citizen has been arbitrary excluded because of race, sex, color or other exclusions which single out any class of persons for different treatment not based on some reasonable classification. Hoyt v. Florida, 368 U. S. 57, 82 S. Ct. 159.

III

The Court should take judicial knowledge of the fact that narcotics or hallucinogenic drug charges are most prevalent among persons under twenty-one (21) years of age.

IV

Not one prospective juror on the panel in this cause is less than twenty-one (21) years of age.

V

A citizen becomes an adult within the jurisdiction of this Court upon reaching his or her seventeenth (17) birthday and the juvenile court no longer has jurisdiction.

WHEREFORE, this defendant respectfully requests that a new jury list be compiled wherein included in said list of eligible jurors there be prospective jurors between the ages of 17 and 21 years in order to comply with the United States Constitution, Fourteenth Amendment and the Florida Constitution Declaration of Rights Section Eleven (11).

Respectfully submitted,

LEMUEL S. HUNNICUTT,
447 Third Avenue North,
St. Petersburg, Florida,
Attorney for Defendant.

Requested Jury Instructions.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY.

CIRCUIT CRIMINAL NO. _____.

STATE OF FLORIDA,

Plaintiff,

v.

DONALD R. McVEAN,

Defendant.

Defendant requests that this Honorable Court give the following instruction to the jury in addition to standard instructions:

If you should find from the evidence that the State has proved beyond and to the exclusion of a reasonable doubt that the defendant is guilty of the offense charged, but you further find from the facts that the State has failed to prove to your satisfaction by more than mere surmise and speculation that the intent to commit the crime originated in the mind of the accused and not in the mind of the officer, then you must find the defendant not guilty by reason of entrapment.

Entrapment is when officers of the law or their agents induce, instigate or lure the accused into committing an offense which he had otherwise no intention of committing.

The practice of inducing or instigating the commission of a crime by an otherwise innocent person is denounced as reprehensible and contrary to sound public policy.

Dupuy v. State, 141 So. 2d 825.

Respectfully submitted,

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Attorney for Defendant.

Supreme Court, U.S.
FILED
NOV 9 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 291

DONALD R. McVEAN,

PETITIONER,

VS.

STATE OF FLORIDA,

RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

EARL FAIRCLOTH
ATTORNEY GENERAL

JOHN A. ZEBEDEE
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

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OTHER AUTHORITIES

Chapter 40, Florida Statutes	5, 7
28 U.S.C., Section 1257(3)	5, 9, 10
U.S.C.A., Section 1257 and cases cited in Note 94	5, 9, 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO. 291

DONALD R. McVEAN,

PETITIONER,

VS.

STATE OF FLORIDA,

RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

OPINION BELOW

The petition filed herein seeks to review the decisions of the District Court of Appeal of Florida, Second District. The first judgment and sentence was entered on October 24, 1969, rehearing denied November 20, 1969, affirming the judgment and sentence entered on December 11, 1968 by the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas County, which sentenced petitioner to imprisonment for a term of from six months to five years for the crime of possession of marijuana. The second judgment was entered on December 31, 1969, per curiam, rehearing denied February 5, 1970, affirming the judgment and sentence entered on May 23, 1969 by the

Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas County, which sentenced him to imprisonment for a term of from six months to five years for the crime of selling marijuana, said sentence to run consecutively to the prior sentence imposed.

A petition for writ of certiorari in the first case of possession was dismissed by the Supreme Court of Florida on January 30, 1970, for alleged procedural error, rehearing denied February 24, 1970. A petition for writ of certiorari in the second case of selling was dismissed by the Supreme Court of Florida for lack of jurisdiction on April 8, 1970. The petition in this second case was unaccompanied by the entire record, the same procedural error which occasioned the dismissal of the petition in the first case.

The opinion of the District Court of Appeal of Florida, Second District, in the first case of "possession" is reported at 227 So.2d 535 of Petitioner's Brief, together with a copy of the order denying rehearing entered on the 20th day of November, 1969, Appendix, p. 13 of Petitioner's Brief. The order of the Supreme Court of Florida granting a motion to dismiss, Appendix, p. 17 of Petitioner's Brief, and the order denying the petition for rehearing dated the 24th day of February, 1970 are set out in the Appendix, p. 19 of Petitioner's Brief.

The per curiam opinion of the District Court of Appeal of Florida, Second District, in the second case of "selling" is reported at 230 So.2d 507(2) and is set out in the Appendix, p. 20 of Petitioner's Brief, together with a copy of the order denying rehearing entered on the 5th day of February, 1970, Appendix, p. 21 of Petitioner's Brief. The order of the Supreme Court of Florida denying the Petition for Writ of Certiorari for lack of jurisdiction is set out in Appendix, p. 22 of Petitioner's Brief.

JURISDICTIONAL STATEMENT

Respondent admits that the basis for jurisdiction for this Court to entertain said petition is conferred by 28 U.S.C. §1257(3). Accordingly, to the extent that there exists substantial federal questions properly presented and passed upon by the District Court of Appeal of Florida, Second District, this Court may, in the exercise of its discretionary jurisdiction, review said decision.

QUESTIONS PRESENTED

1. Whether the exclusion by law from Florida juries of persons between the ages of seventeen and twenty-one years of age violates the Fourteenth Amendment

to the United States Constitution as to a defendant in this age group who is not protected by special juvenile court laws.

2. Whether a criminal conviction in a Florida court and its affirmance on appeal violates the due process clause of the Fourteenth Amendment where the defense of entrapment has been raised and the prosecution fails to offer any proof thereafter that the intent to commit the crime arose in the mind of the accused rather than in the mind of the police officer.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as the same appears on pages four through five of Petitioner's Brief inasmuch as it is supported by the record and is not argumentative in nature.

STATEMENT OF THE FACTS

The pertinent facts relative to the questions before the Court are contained in the body of this Brief under the appropriate questions.

ARGUMENT

POINT I

WHETHER THE EXCLUSION BY LAW FROM FLORIDA JURIES OF PERSONS BETWEEN THE AGES OF SEVENTEEN AND TWENTY-ONE YEARS OF AGE VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS TO A DEFENDANT IN THIS AGE GROUP WHO IS NOT PROTECTED BY SPECIAL JUVENILE COURT LAWS.

Petitioner asserts that Chapter 40 of the Statutes of the State of Florida, providing that the minimum age for jurors be twenty-one years, is unconstitutional. Respondent's position is that such contention does not present a substantial federal question as required by 28 U.S.C., Section 1257(3). "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" Ex parte Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 4, 78 L.Ed. 152 (1933). See also Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); Jacobs v. Tawes, 250 F.2d 611 (4 Cir. 1957).

Petitioner cites no case holding a similar statute unconstitutional and Respondent has been unable to find same.

Such statutes have existed in Florida and in most other states for many years. On the other hand, this Court in Brown v. Allen, 344 U.S. 443, at 471, 73 S.Ct. 397, at 414, 97 L.Ed. 469 (1954), said:

> "* * * It was explained in 1880 by this Court, when composed of justices familiar with the evils the Amendment sought to remedy, as permitting a state to 'confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications'. Strauder v. West Virginia, 100 U.S. 303, 310." (Emphasis Added)

The requirement that a juror be at least twenty-one years of age is not unreasonable. A similar statute (age 25) has been in effect in Massachusetts for many years. It was applied to the selection of jurors in the United States District Court for the District of Massachusetts by statute before 1957, and by practice thereafter. The statutes and the practice have been held not to violate the federal constitution by the Supreme Court of Massachusetts; the District Court and the First Circuit Court of Appeals. Commonwealth v. Slaney, 350 Mass. 400, 215 N.E. 2d 177 (1966); United States v. Golden,

235 F.Supp. 1020 (D. Mass. 1964); King v. United States , 346 F.2d 123 (1st Cir. 1965). See also Pope v. United States, 372 F.2d 710, 723 (8th Cir. 1967).

In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 this court struck down the Illinois statute, which excluded from a jury veniremen having conscientious scruples against or opposed to capital punishment, without stating that they would automatically vote against the imposition of such punishment no matter what the trial revealed. This court held that such action fell short of that impartiality to which the Petitioner was entitled under the Sixth and Fourteenth Amendments. In the case sub judice Petitioner has not shown this Court how persons in the excluded age category would effect the impartiality to which this Petitioner is entitled. Respondent would respectfully submit that there is no evidence whatsoever that persons in the excluded age category would have views any different from those of persons allowed to serve on a Florida jury by Chapter 40, Florida Statutes (1969). In Witherspoon, supra, the petitioner was able to demonstrate that the Illinois statute then in force directly affected the penalty which a jury picked under such statute would render. The petitioner in Witherspoon, supra, was unable however to demonstrate how such selection affected the verdict

said jury would render. This Court therefore reversed as to the penalty but declined to reverse the verdict of guilt.

Respondent respectfully submits that in the absence of some showing on the part of Petitioner, of exactly how the excluded age group would effect Petitioner's verdict, that such verdict must stand. Admittedly the age of twenty-one years does not possess any mystical power, however neither does the age seventeen, nor the age eleven. The point being, the Legislature of the State of Florida chose the minimum age for jurors in Florida to be twenty-one years. The Petitioner has not demonstrated how this adversely affected the verdict in the instant case and in the absence of such showing Respondent submits that the verdict was rendered ". . . by the lawful judgment of his peers and by the law of the land." Magna Carta.

It is Respondent's position that the contention that the twenty-one year requirement is unconstitutional is plainly unsubstantial, under the test prescribed in Ex Parte Poresky, supra.

POINT II

WHETHER A CRIMINAL CONVICTION IN A FLORIDA COURT AND ITS AFFIRMANCE ON APPEAL VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE THE DEFENSE OF ENTRAPMENT HAS BEEN RAISED AND THE PROSECUTION FAILS TO OFFER ANY PROOF THEREAFTER THAT THE INTENT TO COMMIT THE CRIME AROSE IN THE MIND OF THE ACCUSED RATHER THAN IN THE MIND OF THE POLICE OFFICER.

The Petitioner's complaint regarding the trial judge's refusal to give certain requested instructions and his instructions as given, which actions the District Court of Appeal of Florida, Second District affirmed in the opinions sought to be reviewed, utterly fails to raise any federal question required by 28 U.S.C. §1257(3) to confer jurisdiction on this Court.

There can be no question but that the District Court of Appeal of Florida, Second District was judicially construing a matter of substantive state law. This Court has consistently stated as a ". . . basic constitutional principle that the constructions of state laws is the exclusive responsibility of the state courts. . ." Speiser v. Randall, 357 U.S. 513 (1958), note 7 at p. 523.

In Garner v. Louisiana, 368 U.S. 157 this Court stated:

> ". . . We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court. Hence, we must look to Louisiana for guidance in the meaning of the phrase 'foreseeably disturb or alarm the public' in order to determine the type of conduct prescribed by La Rev Stat, 1950, §14:103(7)."

See also: U.S.C.A. §1257 and cases cited in Note 94.

By like token, the construction of substantive state law in regard to a jury instruction on entrapment has been made by the District Court of Appeal of Florida, Second District. This Court by its own pronouncement is bound thereby. No federal question is presented by Petitioner's Question II. Indeed, this Court has specifically held correctness of jury instructions ". . . is a question of local law, with which we have no concern. . ." Louisville etc., R. Co. v. Holloway, Ky.,

246 U.S. 525 (1918).

CONCLUSION

For the reasons set forth hereinabove, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
ATTORNEY GENERAL

JOHN A. ZEBEDEE
Assistant Attorney General

COUNSEL FOR RESPONDENT

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Brief of Respondent In Opposition To Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District to Honorable Gardner W. Beckett, Jr., 52 Sixth Street South, St. Petersburg, Florida 33701, Attorney For Petitioner, this _____ day of November, 1970.

JOHN A. ZEBEDEE
Assistant Attorney General

Supreme Court, U.S.
FILED
JAN 2 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. 291.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI AND FOR STAY OF MANDATE.

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IN THE

Supreme Court of the United States

No. 291.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI AND FOR STAY OF MANDATE.

Petitioner, Donald R. McVean, respectfully prays that this Honorable Court grant his petition for a Writ of Certiorari to the District Court of Appeals of Florida, Second District, heretofore submitted in this cause and as grounds therefor constituting intervening circumstances of substantial or controlling effect and substantial grounds available to petitioner although not previously presented, states the following:

Point I.

THE CONGRESS OF THE UNITED STATES, SINCE THE FILING OF THE PETITION FOR A WRIT OF CERTIORARI, HAS ENACTED THE VOTING RIGHTS ACT OF 1970 LOWERING THE VOTING AGE IN NATIONAL ELECTIONS TO EIGHTEEN YEARS OF AGE EFFECTIVE JANUARY 1, 1971.

Point II.

A Sentence of Six Months to Five Years for "Possession" of Marijuana and an Additional Sentence of Six Months to Five Years for "Sale" of Marijuana, to Run Consecutively, in a Prison Nationally Reported as "Inhuman and Horrible", in the Light of Present Scientific Evidence Surrounding the Harms of the Use and Possession of Marijuana, Constitutes Cruel and Unusual Punishment Contrary to the Guaranty of the Eighth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE PETITION.

Point I.

The Congress of the United States, Since the Filing of the Petition for a Writ of Certiorari, Has Enacted the Voting Rights Act of 1970 Lowering the Voting Age in National Elections to Eighteen Years of Age Effective January 1, 1971.

Petitioner, in his Petition for Writ of Certiorari, assigned as Point I in support of said Petition, the following:

"THE EXCLUSION BY LAW FROM JURIES OF PERSONS IN A CERTAIN AGE CATEGORY, NOT OTHERWISE PROTECTED BY SPECIAL JUVENILE COURTS, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT."

The Congress of the United States in enacting the Voting Rights Act of 1970 stated the following:

"Sec. 301(a) The Congress finds and declares that the imposition and application of the requirements that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibility imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment to the Constitution; and

(3) does not bear a reasonable relationship to any compelling state interest.

(b) In order to secure the constitutional rights set forth in subsections (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen year of age or over."

Approved June 22, 1970 to take effect after January 1, 1971 and upheld by this Court on December 21, 1970.

Point II.

A Sentence of Six Months to Five Years for "Possession" of Marijuana and an Additional Sentence of Six Months to Five Years for "Sale" of Marijuana, to Run Consecutively, in a Prison Nationally Reported as "Inhuman and Horrible", in the Light of Present Scientific Evidence Surrounding the Harms of the Use and Possession of Marijuana, Constitutes Cruel and Unusual Punishment Contrary to the Guaranty of the Eighth Amendment to the Constitution of the United States.

A. What Are the Harmful Effects of Marijuana That Make Its "Use" or "Possession" a Crime in Every State in the United States?

1. "Neither the ingestion of marihuana nor the smoking of marihuana cigarettes affects the basic outlook of the individual except in a very few instances and to a very slight degree. . . . In other words reactions which are natively alien to the individual cannot be induced by the ingestion or smoking of the drug. . . . Other effects of marijuana use, however, are not similar to alcohol. The long term psychological effects of marijuana use, unlike those of alcohol, are not neurosis or psychotic illness. Also, for most people the use of marijuana does not result in socially aggressive activity, which frequently does result from the use of alcohol.

There do not appear to be any long-term effects from the use of marijuana except perhaps a form of generalized fatigue. The major distinction between marijuana and 'hard narcotics' is that marijuana is not addictive, but like tobacco, is capable of inducing habitual use. In fact, it appears easier to stop smoking marijuana than it does to stop smoking tobacco. Being nonaddictive, marijuana use does not result in physical dependence or tolerance. . . ."[1]

2. "Virtually all scientists who have studied marijuana agree that it is not addictive. There is no reason to believe that its use, even in a minority of cases, directly causes experimentation with drugs that *are* addictive. In 1894, the Indian Hemp Drug Commission reported that it could find no factual support for fears that marijuana-type drugs cause crime, insanity or "moral injury"; the U. S. Canal Zone report of 1925 and the New York Mayor's Committee on Marijuana of 1943 also failed to find any such evidence. The Canal Zone investigation, conducted by the U. S. Army, concluded that alcohol was a more serious problem. Recent tests by the Washington State Motor Vehicles Department found that marijuana does not significantly impair driving ability. No statistical study has yet linked this drug to cancer, heart disease or emphysema, as cigarette smoking has been linked. The 1968 Zinberg-Weil-Nelsen study at Boston University found no lasting impairment of intellectual performance among marijuana users. If marijuana does have any serious adverse effects, they have so far eluded detection."[2]

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1. Excerpt from Vol. 13, *Villanova Law Review*, pps. 852 and 853. The article, "Marijuana and the Law: The Constitutional Challenges to Marijuana Laws in Light of the Social Aspects of Marijuana Use", cites extensively from "LaGuardia Report—THE MARIJUANA PAPERS" and every other available report up to date of its publication, Summer of 1968.

2. Excerpt from "An Open Letter to the Parents of Robert F. Kennedy, Jr., and R. Sargent Shriver, III", *Playboy Magazine*, November 1970 issue, page 66.

3. "Alcohol seems to impair driving ability more than marijuana. . . . The poorer driving records of pot smokers (discovered in a related study) are probably due to factors other than the use of marijuana."[3]

4. "Marijuana is no more dangerous than alcohol . . ."[4]

B. The "Correctional" Institutions.

1. "There are nearly 1,000 inmates at Raiford Prison above the prison's designated capacity. . . . Raiford has 60 cells containing 10 men each with only one commode and one lavatory in each of the cells. . . . There are more than 3,500 inmates at the prison, which was designed for 2,600 prisoners. . . . There are 200 inmates sleeping on the floor at the Lake Butler correctional facility (another Florida 'correctional' institute). . . ."[5]

2. "I went through (Raiford) and saw 10 men stacked up in one cell barely 600 feet square, with one open toilet. . . . I don't have any words to describe how I felt. I was horrified . . ."[6]

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[3] Report from Washington's Department of Motor Vehicles after a six week test as reported in *Playboy Magazine*, September 1969 issue, page 72, titled "Pot, Booze and Gasoline".

[4] Dr. James Goddard, Chief of the Food and Drug Administration as reported in *Playboy Magazine*, February 1968 issue, page 51, titled "Feds Ponder Pot".

[5] Excerpt from talk delivered by Mr. Louie Wainwright, Director of State Prison Division of Corrections to the Senate Ways and Means Committee as reported in *St. Petersburg Times* newspaper, November 10, 1970.

[6] State Senator Kenneth Myers, D-Miami, head of Committee for Health, Welfare and State Institutions as reported by *St. Petersburg Times* newspaper, December 2, 1970.

3. "HORRORS REVEALED IN RAIFORD TOUR"[7]

4. "We are warehousing men in our jails with no thought to adequate rehabilitation systems and, as a result, our jails are turning out better criminals, rather than better citizens. Sexual abuse, rape, and degradation have for too long been the norm in our jails. . . ."[8]

CONCLUSION.

The Congress of the United States has declared that the denial of the right to vote for citizens between the ages of 18 and 21 denies to these citizens the guaranties of "due process" and "equal protection" afforded by the Constitution of the United States. It is respectfully submitted that the denial to persons in this age category of jurors their own age likewise deprives these citizens of these constitutional privileges.

This Court has heretofore held that imprisonment, even for a day, can constitute "cruel and unusual punishment" where the punishment is so disproportionate to the offense as to shock public sentiment and violate judgment of reasonable people concerning what is right and proper under the circumstances.[9]

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7. Headline from "Merry-go-Round" by syndicated columnist Jack Anderson as reported in *St. Petersburg Times*, October 1, 1970.

8. Excerpts from statements of State Senator Robert L. Shevin, D-Miami, as Chairman of Senate Jurisprudence subcommittee.

9. *Robinson v. California*, 370 U. S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417; *Hemans v. U. S.*, C. C. A. Mich. 1947, 163 F. 2d 228, cert. den. 68 S. Ct. 100, 332 U. S. 801, 92 L. Ed. 380, reh. den. 68 S. Ct. 152, 332 U. S. 821, 92 L. Ed. 397. To the same effect in state courts see *Kenimer v. State* (1950), 81 Ga. App. 437, 59 S. E. 2d 296, 83 Ga. App. 264, 63 S. E. 2d 280; *Faulkner v. State* (1968 Alaska), 445 P. 2d 815; *McDonald v. Commonwealth* (1899), 173 Mass. 322, 53 NE 874, aff'd. 180 U. S. 311, 45 L. Ed. 542, 21 S. Ct. 389.

Marijuana laws are today tempered with the discretion afforded the prohibition of alcohol in 1919. The failure of the state legislatures to act in light of the scientific evidence surrounding the harms of the use of marijuana compel this Court to bring the penalties more in line with those of similar crimes such as violation of alcohol laws. The country depends upon it.

For the reasons herein expressed, petitioner respectfully requests of this Honorable Court an order granting the writ of certiorari as hereinbefore requested and staying the mandate of this Court.

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Edwin W. Bennett, Jr.
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St. Petersburg, Florida [illegible]
Attorneys for Petitioner

Certificate of Counsel.

I, the undersigned, herewith certify that the foregoing Petition is presented in good faith and not for delay and that said Petition is restricted to the grounds as set forth in Rule 58, Supreme Court Rules.

GARDNER W. BECKETT, JR.

Certificate of Service.

This is to certify that I have served a copy of the accompanying Petition for Rehearing and for Stay of Mandate to the office of the Honorable Earl Faircloth, Attorney General, State of Florida, Capital Building, Tallahassee, Florida 32304, this 30th day of December, 1970.

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